Supreme Court, U.S.
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No. 95-1598

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

LEROY L. YOUNG and
ATTORNEY GENERAL OF OKLAHOMA,
Petitioners,

v.

ERNEST EUGENE HARPER,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

REPLY BRIEF OF PETITIONERS

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October, 1996

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REPLY BRIEF OF PETITIONERS

PROPOSITION I

THE PETITION FOR WRIT OF CERTIORARI WAS TIMELY FILED AND CONSIDERED BY THE COURT OF APPEALS ON THE MERITS; THUS, THIS COURT HAS JURISDICTION TO HEAR THIS MATTER.

A. The Petition for Rehearing was Timely Filed.

The Respondent contends this Court lacks jurisdiction to hear this matter because the Petitioners' Petition for Rehearing and Suggestion for Rehearing *En Banc* ("Petition for Rehearing") filed in the United States Court of Appeals for the Tenth Circuit ("Court of Appeals") was untimely. Thus, the Respondent maintains the Petition for Rehearing did not toll the 90-day period for seeking certiorari by this Court. The Respondent neglects to consider the effect of the Order of the Court of Appeals dated September 25, 1995 and the actions taken by the Court of Appeals which reveal that the Petition for Rehearing was timely filed.

Initially, the Petitioners note that on September 25, 1995, an Order was entered by the Court of Appeals allowing the Petition for Rehearing to be filed. In addition, the Court of Appeals ordered that Respondent file a response to the Petition for Rehearing.[1] Fed. R. App. P. (40)(a) provides, in pertinent part:

> A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule.

[1] A copy of the Order of the Court of Appeals dated September 25, 1995 is reprinted at page 1a of the accompanying Appendix A to this Reply Brief ("Rep. App.").

Pursuant to 10th Cir. R. 40.3:

> In all other cases petitions for rehearing or suggestions for rehearing *en banc* shall be filed within 14 days after the entry of judgment. The time for filing a petition for rehearing or suggestion for rehearing *en banc* may be shortened by order of the court, but will not be extended except for good cause shown.

It is apparent by the actions of the Court of Appeals, in issuing an order allowing the filing of the Petitioners' Petition for Rehearing, that the Court of Appeals, *sua sponte,* found good cause for granting an extension to allow the filing of the Petition for Rehearing to be timely filed.[2]

It is also apparent, due to the failure of the mandate of the Court of Appeals to issue on or before September 20, 1995, that the Petition for Rehearing was timely filed. Fed. R. App. P. 41(a) provides, in pertinent part:

[2] The Petition for Rehearing reveals that the petition was mailed to Respondent on September 11, 1995. Thus, it can be presumed that the petition was also mailed for filing with the Court of Appeals on or before September 11, 1995. The petition, however, was not filed until September 15, 1995. Counsel for Petitioners deposited the petition in the United States mail at least two days prior to the date such petition was due. Perhaps the Court of Appeals realizing that counsel acted within the time frame allowed by Fed. R. App. P. 40(a) and 10th Cir. R. 40.3 granted the extension because it would have been unjust for the mandate to have issued. See Application of Kenneth T. Snyder, 557 F.2d 820 (C.C.P.A. 1977).

> The mandate of the court **must** issue 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. The **timely** filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court.

(Emphasis added). In the present matter, the docket sheet from the Court of Appeals reveals that the mandate did not issue until February 21, 1996, after the entry of the order denying the petition for rehearing. Jt. App. at 22-27.

It is apparent that Fed. R. App. P. 41(a) contains mandatory language that the mandate **must** issue unless a timely petition for rehearing is filed. In the present matter, the mandate did not issue on or before September 20, 1995; thus, it is apparent that the Court of Appeals, through the extension granted, considered the Petition for Rehearing to be timely filed.

Similar to the case of Missouri v. Jenkins, 495 U.S. 33 (1990), this Court should presume that the Court of Appeals withheld the mandate because, pursuant to Rule 41(a) it must do so when a timely petition for rehearing is pending. Id., at 48-49.

In addition, the actions of the Court of Appeals reveal that the order of September 25, 1995 was an extension granted to the Petitioners because the Court of Appeals transmitted the suggestion for rehearing *en banc* to the full court without an express order of the hearing panel. Pursuant to 10th Cir. R. 35.3, an untimely suggestion for rehearing *en banc* will only be transmitted to the full court upon express order of the panel. The docket sheet from the Court of Appeals reveals that an order of the panel was not issued. Jt. App. at 22-27. Again, the actions of the Court of Appeals clearly indicate that the Petition for Rehearing was timely filed.

The Court of Appeals issued an order allowing the Petitioners to file a Petition for Rehearing and Suggestion for Rehearing *En Banc*. As this Court stated in Missouri v. Jenkins,

> The [Tenth] Circuit surely knows more than we do about the meaning of its orders, and we accept its action for what it purports to be.

Id., at 49-50. The actions of the Court of Appeals conclusively reveal that the effect of the order was to make the filing of the Petition for Rehearing timely.

As the Petition for Rehearing and Suggestion for Rehearing *En Banc* were timely filed, the period in which a petition for *writ of certiorari* must be sought did not begin to run until a decision was rendered concerning the petition for rehearing. Sup. Ct. R. 13.3. See also Missouri v. Jenkins, 495 U.S. at 45. The Petition for Writ of Certiorari was filed

within ninety days after the denial of the petition for rehearing. Accordingly, this Court has jurisdiction to address the question presented and accepted for review by this Court.

B. The Petition for Rehearing was Reviewed on the Merits.

The record before this Court reflects that the merits of the Petition for Rehearing were considered by the Court of Appeals. The record reveals that on September 25, 1995, an Order was entered by the Court of Appeals allowing the Petition for Rehearing to be filed. In addition, the Court of Appeals ordered that Respondent file a response to the Petition for Rehearing.[3] This action of the Court of Appeals indicates that the Petition for Rehearing was considered on the merits.

As the First Circuit Court of Appeals stated in Denholm & McKay Co. v. Commission of Internal Revenue, 132 F.2d 243, 247-48 (1st Cir. 1942):

> A petition for rehearing may be filed out of time, in two senses; (1) it may be filed after the period prescribed by rule of court within which such petitions may be filed, but before the statutory period for appeal has expired, and (2) it may be filed after the statutory period for taking an appeal has elapsed.

[3] See Rep. App. at 1a.

> If untimely in the first sense, the court may nevertheless grant special leave for the filing of the petition for rehearing, which would indicate that the grounds urged in such petition will be considered on their merits. This is "entertainment" of the untimely petition; and the time for taking an appeal will not begin to run until the petition is disposed of. See United States v. Seminole Nation, 1937, 299 U.S. 417, 57 S.Ct. 283, 81 L.Ed. 316; Bowman v. Lopereno, 311 U.S. 262, 266, 61 S.Ct. 201, 85 L.Ed. 177.

In Bowman v. Lopereno, 311 U.S. 262 (1940), the District Court granted permission to file a late second petition for rehearing. A hearing was held and the District Court in its opinion stated:

> "This matter is before the Court (a) on a petition to review an order of this court denying review of an order to set aside adjudication; (b) on a petition to review an order of the Referee calling a meeting of creditors for electing, and electing a trustee, in the above entitled estate."
>
> . . . "The petition for review was denied."

Id., at 265, quoting Re Bowman, 110 F.2d 348, 42 Am Bankr Rep (NS) 526. This Court held that the permission granted by the District Court allowing the filing of the late petition, together with the hearing and the opinion of the court, show

that the petition for rehearing was entertained by the District Court and dealt with upon its merits. Id., at 266.

Likewise, in the present matter, the fact that the Court of Appeals granted permission to file the Petition for Rehearing and requested the Respondent file a response to the petition clearly indicates that the petition was entertained by the Court of Appeals and considered upon the merits. In addition, the fact that five judges would have granted rehearing *en banc* reveals that the merits of the petition were considered by the Court of Appeals.

The Respondent contends the order of the Court of Appeals reveals that the Court of Appeals did not review the Petition for Rehearing on the merits. The Respondent relies on Pfister v. Northern Illinois Finance Corp., 317 U.S. 144 (1942), to support its position that if an ambiguity exists as to whether the petition for rehearing was considered on the merits, the terms of the court's order should control. The Petitioners contend, however, that no ambiguity exists.

As discussed above, the actions of the Court of Appeals, much like the District Court's actions in Bowman v. Lopereno, clearly indicate that the Petition for Rehearing was considered on its merits.

The Petition for Rehearing was timely filed and considered on the merits by the Court of Appeals. Accordingly, the Petition for Writ of Certiorari filed with this Court was timely filed. Thus, this Court has jurisdiction of this matter.

PROPOSITION II

THE STATE DID NOT VIOLATE RESPONDENT'S DUE PROCESS RIGHTS WHEN RESPONDENT WAS RECLASSIFIED TO A HIGHER SECURITY LEVEL WHILE SERVING HIS JUDGMENT AND SENTENCE.

The Pre-Parole Conditional Supervision Program is Clearly Different than Parole.

The Respondent contends that the Pre-Parole Conditional Supervision Program (the "Program") cannot be distinguished from parole for the purposes of Morrissey v. Brewer, 408 U.S. 471 (1972). The Respondent then attempts to demonstrate that parole and the Program are the same and that the Program is merely an "early release". (Brief of Respondent, at 12 n. 38; 28).

The Program is significantly distinguishable from parole. In the Brief of Petitioners, many of the differences are discussed. The differences between the Program and parole include:

1. the purpose of the Program, as implemented by the State Legislature, is to reduce prison overcrowding,[4] whereas the purpose of parole is to help reintegrate the inmate into society;[5]

2. an inmate must have served at least fifteen percent (15%) of his sentence and be within one year of his parole consideration date or one year of his projected release date to be eligible for the Program,[6] whereas to be eligible for parole the inmate must have completed one-third (1/3) of his sentence;[7]

3. an inmate, after being recommended by the Pardon and Parole Board (the "Board") is placed on the Program at the discretion of the Department of Corrections ("DOC"),[8] whereas an inmate, after being recommended by the Board, is placed on parole at the discretion of the Governor of the State of Oklahoma;[9]

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[4] Okla. Stat. tit. 57 § 365 (Supp.1990).
[5] Morrissey v. Brewer, 408 U.S. at 477.
[6] Okla. Stat. tit. 57, § 365 (Supp.1990).
[7] Okla. Stat. tit. 57, § 332.7 (Supp.1993).
[8] Pet. App. at 43a-52a.
[9] Okla. Stat. tit. 57, § 332 (1991); Okla. Stat. tit. 57, § 332.7 (Supp.1993).

4. an inmate on the Program is subject to the disciplinary proceedings of the DOC;[10]

5. an inmate who fails to report as required or escapes from the Program is subject to prosecution for escape pursuant to Okla. Stat. tit. 21, § 443,[11] whereas a parolee who fails to report would only be subject to revocation of parole due to such technical violation; [12]

6. an inmate on the Program continues to serve his sentence and receives earned credits pursuant to Okla. Stat. tit. 57, § 138 (Supp.1989), whereas a parolee is not serving his sentence and, if parole is revoked, the parolee is not entitled to deduct from his sentence time spent on parole;[13]

7. an inmate on the Program cannot leave the State of Oklahoma for any reason,[14] whereas a parolee can leave the State of Oklahoma upon receiving permission;[15];

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[10] Okla. Stat. tit. 57, § 365(E) (Supp.1990).
[11] Okla. Stat. tit. 57, § 365(F) (Supp.1993).
[12] Resp. App. at 28a.
[13] Okla. Stat. tit. 57, § 350 (Supp.1987). See also Thurman v. State, 500 P.2d 1074, 1075 (Okla. Crim. App. 1972).
[14] Jt. App. at 7.
[15] Resp. App. at 27a.

8. an inmate on the Program must remain supervised at all times, whereas a parolee may be unsupervised after three years on parole;[16] and

9. an inmate on the Program must maintain full time employment or be involved in a full time educational/ vocational program,[17] whereas a parolee is not required to meet such a requirement.

In addition, as this Court stated in Morrissey, a parolee relies on an implicit promise that parole will be revoked only if he violates a condition of parole. Morrissey v. Brewer, 408 U.S. at 482. As this Court noted, in many cases, a parolee will face a lengthy incarceration if his parole is revoked. Id.

An inmate on the Program, however, has not received such an implicit promise. An inmate on the Program is clearly aware that he remains in the exclusive custody and control of the DOC. An inmate is also aware that if he does not have full time employment or is not involved in a full time educational/vocational program he will be considered a program failure and will be reclassified. An inmate is also aware that if he is denied parole he may be reclassified. An inmate on the Program is aware of the

[16] Okla. Stat. tit. 57, § 512 (Supp.1993).
[17] Jt. App. at 8.

many differences between parole and the Program. Jt. App. at 4, 5 and 9. Furthermore, if an inmate on the Program is reclassified to a higher security level, unless credits are deducted in a disciplinary proceeding, he will retain all credits earned just as any inmate reclassified by the DOC.

The Respondent alleges that parolees, just as inmates on the Program, remain within the custody of the DOC. The custody in which a parolee is considered is merely in theory only. Although a parolee is supervised by an employee of the DOC, the DOC does not retain any other control over a parolee unless or until a parole violation occurs. An inmate on the Program, however, remains within the control of the DOC at all times. As the Respondent stated, he was required to meet with a supervisor weekly and give his supervisor a weekly itinerary so that DOC would know where to locate the Respondent at all times.[18] Furthermore, an inmate on the program is subject to disciplinary proceedings of the DOC. Okla. Stat. tit. 57 § 365(E) (Supp.1990).

The respondent cites Spurlock v. State, 72 P.2d 731 (Okla. Crim. App. 1986), *rev'd* Plotner v. State, 721 P.2d 810 (Okla. Crim. App. 1986), in support of his position that a parolee remains within the custody of the DOC. In Plotner, the Oklahoma Court of Criminal Appeals reversed Spurlock for the reason that an appellant does not lose his right to appeal his conviction merely because he is granted a parole from the conviction. Thus, similar to federal law, a parolee remains "in custody" within the meaning of the habeas corpus

[18] Resp. Reply Br. at 8, filed April 13, 1995 (No. 95-5026).

statute and does not lose his ability to petition for habeas corpus relief merely because he is placed on parole. Jones v. Cunningham, 371 U.S. 236, 243 (1963).

The Respondent makes a point to draw to this Court's attention the fact that apparently many of the arguments raised in Morrissey are being raised by Petitioners in this matter. The Petitioners would assert, however, that even if the arguments are the same, the facts are completely different. As discussed in the Brief of the Petitioners and as shown above, the Program differs significantly from parole. It would work an absurdity to allow an inmate, who does not meet the eligibility requirements for parole to have the same rights and interests of an inmate who has qualified for release on parole.

The interests of an inmate on the Program and a parolee are not the same. As discussed in the Brief of the Petitioners, and as stated by this Court in Meachum v. Fano, 427 U.S. 215, 224 (1976), it is the nature of the interest involved that determines whether a liberty interest is implicated within the meaning of the Due Process Clause. Again, as shown above and fully addressed in the Brief of Petitioners, the nature of the interest of an inmate on the Program is not the same as a parolee.

CONCLUSION

An inmate on the Program does not have a constitutionally protected liberty interest in continued participation in the Program. Accordingly, the opinion of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

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APPENDIX A

Order Entered September 25, 1995 From the United States Court of Appeals for the Tenth Circuit 1a

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ERNEST EUGENE HARPER,	)	
	)	
Petitioner-Appellant,	)	
v.	)	No. 95-5026
	)	
LEROY L. YOUNG, and ATTORNEY GENERAL OF OKLAHOMA,	)	
	)	
	)	
Respondent-Appellee.	)	

ORDER
Filed September 25, 1995

Before SEYMOUR, Chief Judge, McKAY, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE and LUCERO, Circuit Judges.

The court grants appellees leave to file a late petition for rehearing and suggestion for rehearing en banc.

Appellant shall file a response to the petition for rehearing and suggestion for rehearing en banc within 20 days from the date of this order.

Entered for the Court

PATRICK FISHER, Clerk

By: S/Opal A. Carter
Opal Carter, Deputy Clerk